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ESTATE PLANNING TECHNIQUES AND THE OWNERSHIP OF CANADIAN SECURITIES*

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THE post-World War II Canadian business boom, financed largely by some 7.5 billion United States dollars from south of the border,[1] has generated an unprecedented investment interest in all varieties of Canadian securities on the part of United States citizens or residents.[2] With an almost endless need for more and evermore risk capital for the development of basic industries[3]—oil, natural gas,[4] electric power, aluminum, iron ore, nickel, steel production and fabrication, petrochemicals, and synthetic textiles—the end of this boom is not yet in sight. In consequence, Canadian securities now comprise, and for the immediate future will probably continue to comprise, at least a respectable portion of the portfolios of an ever increasing number of individual American investors of substantial fortune.[5]

The direct ownership of Canadian securities by individuals who are United States citizens or residents poses numerous estate tax complications. These

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1. See articles by John G. Forrest, N.Y. Times, July 27, 1952, § 3, p. 1. col. 5; July 28, 1952, p. 26, col. 6; July 29, 1952, p. 29, col. 5. Forrest estimates our investments in Canada at 8 billion, while the Wall Street Journal, Aug. 28, 1952, p. 1, col. 4, quotes the lesser figure of 7.5 billion. See also N.Y. World-Telegram and Sun, Oct. 17, 1952, p. 38, col. 3.

2. C. D. Howe, Canada's Minister of Trade and Commerce, puts at 2 billion the size of the American investment in Canada since World War II. N.Y. World-Telegram and Sun, Sept. 14, 1952, p. 7. The investment trend has been somewhat reversed since the Canadian dollar recently rose above $1.00 in terms of United States dollars, it being estimated that some $350,000,000 of Canadian internal bonds held by United States investors have been liquidated since the Canadian dollar went to a premium. N.Y. World-Telegram and Sun, Oct. 17, 1952, p. 38, col 3. See also Wall Street Journal, Nov. 10, 1952, p. 18, col. 1.

3. For an excellent bird's eye summary of the principal features marking Canada's current boom, see Fortune, Aug., 1952, *passim*.

4. In the oil and natural gas fields fully one half of current new investments originate south of the border. Wall Street Journal, Sept. 11, 1952, p. 1, col. 1. Much of such risk capital comes from United States corporate investors, not private individuals, and so does not generate estate planning complications.

5. See Wall Street Journal, July 8, 1952, p. 22, col. 1. There are even United States investment trusts confining their investment interest exclusively to Canada. N.Y. Times, July 7, 1952, p. 30, col. 1.

complications need not, however, constitute estate tax disadvantages if proper investment planning during the owner's life is coupled with informed and careful will draftsmanship. In view of the heavy additional estate taxation which may result from a failure to observe both of these conditions, an examination of the basic principles of effective estate planning for individuals owning Canadian investments is now peculiarly timely.

The major premise upon which Federal estate taxation is built is that all the property—excluding only realty located without the United States—belonging to a decedent United States citizen or resident is subject to Federal estate taxation.[6] Canada likewise taxes the succession to property situate within its borders belonging to a non-resident alien,[7] and such Canadian taxes may include provincial[8] as well as Dominion[9] duties. Under certain conditions a credit, as specified in the United States-Canadian Death Tax Convention[10] or as provided for in the Internal Revenue Code,[11] may be applied against the Federal estate tax otherwise payable on account of succession duties paid in Canada, thus entirely removing, or at least greatly mitigating, the rigors of multiple taxation. Where the conditions to the allowance of this credit are not met, however, Canadian succession duties do not serve as an offset against the Federal estate tax. The circumstances under which this credit against the Federal estate tax becomes available must therefore be carefully examined, since no deduction in the net estate subject to such tax is allowable for "any estate, succession, legacy, or inheritance taxes,"[12] no matter to what taxing entity paid. Following a discussion of the credits allowed by the Convention and the Code, this article will treat the problems created by provincial succession duties.

CREDIT ALLOWABLE UNDER THE DEATH TAX CONVENTION WITH CANADA

The Credit

Under the present Death Tax Convention with Canada,[13] the estate of a decedent citizen or domiciliary of the United States is allowed a credit against

6. INT. REV. CODE § 811.

7. The Dominion Succession Duty Act, 1941, 4&5 GEO. VI, c. 14, § 6(b), as amended, 10 GEO. VI, c. 46, § 1 (1946), 11&12 GEO. VI, c. 47, § 2 (1948) [changing § 6(b) of the 1941 Act to § 6(1)(b)].

8. Ontario and Quebec both levy provincial succession duties, the former continuously since July 1, 1892, and the latter continuously since June 24, 1892.

9. The Dominion Succession Duty Act, 1941, as amended, *supra* note 7, § 6(1)(b).

10. See note 13 *infra*.

11. INT. REV. CODE §§ 813(c), 936(c).

12. INT. REV. CODE § 812(b).

13. With the exchange of instruments of ratification on February 6, 1945, the Convention between the United States and Canada for the avoidance of double taxation and prevention of fiscal evasion with respect to estate taxes and succession duties, signed June 8, 1944, came into effect retroactively as of June 14, 1941, the effective date of the Dominion

the Federal estate tax otherwise payable on account of succession duties paid to the Dominion.[14] The credit is available only where there is succession of property deemed situate within Canada under the Convention situs rules discussed below, since only such property is subject to Dominion succession duties. In order to limit the allowance of this credit to situations where double taxation would otherwise be imposed, the Convention places three principal limitations upon the credit's allowability.

Limitations upon the Allowance of the Credit

First, the credit is allowable only for Dominion succession duties and has no application to any provincial succession duty which may be paid.[15] As these provincial taxes in their turn serve as a credit against the Dominion tax up to a maximum of 50 percent of such Dominion duty otherwise payable,[16] provincial tax liability may serve drastically to reduce the amount of credit available under the Convention as an offset to the Federal estate tax. But with respect to decedents dying after the effective date of the Revenue Act of 1951 (October 20, 1951), a full credit for both Canadian Dominion and provincial succession duties may be available under the Internal Revenue Code,[17] which in this respect may prove more liberal than the terms of the Convention.

Second, the credit is allowable only for Dominion succession duties paid with respect to property actually subject both to Dominion and Federal taxation.[18] Consequently, where the estate of a citizen of, or resident in, the United States includes Canadian realty, Dominion succession duties paid on this property can not serve as a credit against the estate's Federal tax, because foreign real estate does not constitute part of a decedent's taxable estate for Federal purposes.[19] A credit is similarly denied for Dominion succession duties paid with respect to property (a) specifically devised or bequeathed to a charitable organization for which a Federal estate tax deduction is prop-

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Succession Duty Act, and is applicable in the case of persons dying on or after June 14, 1941, and before November 21, 1951. S. Ex. G., 78th Cong., 2d Sess., 59 STAT. 915, Art XIV (1944). The original Convention was modified by a supplementary Convention signed on June 12, 1950, and as thus modified is applicable to the estates of persons dying on or after November 21, 1951, the date instruments of ratification were exchanged. S. Ex. G., 81st Cong., 2d Sess. Art. VII. Hereinafter the original Convention is referred to as "the Convention."

14. Convention, Art. V, ¶ 1.

15. Convention, Art. I, ¶ 1; T.D. 5455, § 82.2, 1945 CUM. BULL. 381, 386.

16. Section 11A(2), The Dominion Succession Duty Act, as amended, 1 Eliz. II, c. 24, § 6 (1952).

17. INT. REV. CODE §§ 813(c), 936(c), added by Revenue Act of 1951, § 403, 1951 U.S. CODE CONG. SERV. 460.

18. Convention, Art. V, ¶ 1; *cf.* T.D. 5455, § 82.7, 1945 CUM. BULL. 381, 389, 390. See also T.D. 5565, § 82.107(b), 1947-1 CUM. BULL. 125, 139.

19. INT. REV. CODE § 811; *cf.* T.D. 5455, § 82.7, 1945 CUM. BULL. 381, 390. See also T.D. 5565, § 82.107(a), 1947-1 CUM. BULL. 125, 136.

erly allowable,[20] (b) identified as previously taxed,[21] (c) specifically devised or bequeathed to the decedent's surviving spouse, for which the Code allows a marital deduction,[22] or (d) property lost during the settlement of the estate.[23]

Third, the amount of the allowable credit may not exceed that portion of the total Federal estate tax properly attributable to that part of the decedent's estate which has already borne the Dominion succession duty, but in no event in an amount exceeding the total Dominion succession duty paid thereon.[24] Thus the credit may not exceed the lower of the two figures computed under the second and third limitations.

Applications of the Limitations

The full scope and effect of the second and third limitations upon the credit allowable under the Convention can perhaps best be illustrated by concrete example. Assume that one Absalom Uriah Stockwell, a citizen of the United States resident in New York City, died on October 21, 1952, leaving a gross estate—valued for Federal estate tax purposes as of the date of his death [25]—of U.S. $500,000 (United States dollars) consisting of U.S. $200,000 in stocks of Canadian corporations, U.S. $200,000 in stocks of United States corporations, and U.S. $100,000 of cash on deposit in New York banks. The decedent's legatees were two in number: The Achitophel Memorial Fund, a Section 101(6)[26] charitable institution not organized under Canadian law, to which Canadian securities valued at U.S. $100,000, or C$96,180 (Canadian dollars)[27] were specifically bequeathed; his father, David Joab Stockwell, to whom decedent bequeathed the residue of his estate wherever situate, including valuable British Columbia timber lands owned in fee and valued at C$100,000. All estate, inheritance, and succession taxes payable by the entire estate were specifically charged to the residue.

Upon the foregoing facts, a Federal estate tax—less the appropriate credit for New York estate taxes paid, but prior to any credit on account of

20. INT. REV. CODE § 812(d); *cf.* T.D. 5455, § 82.7, 1945 CUM. BULL. 381, 391. See also T.D. 5565, § 82.107(a), 1947-1 CUM. BULL. 125, 137.

21. INT. REV. CODE § 812(c); *cf.* T.D. 5455, *supra* note 20. See also T.D. 5565, *supra* note 20.

22. INT. REV. CODE § 812(e); *cf.* T.D. 5455, *supra* note 20. See also T.D. 5565, *supra* note 20.

23. INT. REV. CODE § 812(b); *cf.* T.D. 5565, *supra* note 20.

24. Convention, Art. V, ¶ 1; *cf.* T.D. 5455, § 82.7, 1945 CUM. BULL. 381, 390-1. See also T.D. 5565, § 82.107(b), 1947-1 CUM. BULL. 125, 139.

25. It has been assumed that no election is made to value the gross estate as of the optional valuation date pursuant to INT. REV. CODE § 811(j).

26. INT. REV. CODE § 101(6).

27. Converted at exchange rate of 103.97, the closing rate for the Canadian dollar on October 21, 1952, as quoted in N.Y. Herald Tribune, Oct. 22, 1952, p. 36, col. 3. This rate of exchange has been used throughout in arriving at any amounts expressed in Canadian currency.

Dominion succession duties—will amount to U.S. $87,700. The Dominion tax upon the stock bequeathed to The Achitophel Memorial Fund is C$23,564.10;[28] and the Dominion tax upon David's Canadian succession, consisting of C$96,180 in Canadian stocks and C$100,000 in Canadian real estate, totals C$52,380.06.[29] No Federal estate tax is payable by Absalom's estate on the shares of Canadian stock specifically bequeathed to charity.[30] Thus, under the second Convention limitation, no credit is allowable for the C$23,564.10 Dominion succession duty paid by the estate on account of these shares.[31] Had the British Columbia real estate, instead of the Canadian shares, been devised to Achitophel, a similar result would have followed. Yet a credit would have been allowable if the Canadian shares had been bequeathed to David instead of to the charity, for whom provision could have been made by specific bequest of securities in United States corporations.[32]

A credit is allowable, however, on account of the residue passing to David which otherwise would be subjected to double taxation. The second limitation requires a computation of the Dominion duty attributable to that portion of David's inheritance taxable in both countries. This figure bears the same ratio to the Dominion succession taxes imposed on the total property passing to David (C$52,380.06) that the value of that portion of the residue constituting property situate in Canada and also subject to Federal estate taxation (C$96,180) bears to the value of the entire residue subjected to Dominion succession duties (C$196,180).[33] Or expressed mathematically, X, the Dominion succession tax attributable to the doubly-taxable portion of David's inheritance is

$$\frac{\text{C\$ 96,180}}{\text{C\$196,180}} \times \text{C\$52,380.06.}$$

$$X = \text{C\$25,680.06 or U.S. \$26,699.50.}$$

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28. Sections 10, 11, and First Schedule thereto, The Dominion Succession Duty Act, 1941, as amended to date.

Initial rate of duty on C$292,360.	8.9%
Additional rate of duty on C$96,180.	15.6%
Total rate of duty on C$96,180.	24.5%
C$96,180. x 24.5% =	C$23,564.10

29. See statutory provisions cited note 28 *supra*.

Initial rate of duty on C$292,360.	8.9%
Additional rate of duty on C$196,180.	17.8%
Total rate of duty on C$196,180.	26.7%
C$196,180. x 26.7% =	C$52,380.06

30. INT. REV. CODE § 812(d).

31. See note 20 *supra*.

32. See T.D. 5565, § 82.107(b), Examples (2), (3), 1947-1 CUM. BULL. 125, 140.

33. Convention, Art. V, ¶ 1; *cf.* T.D. 5455, § 82.7, 1945 CUM. BULL. 381, 390-1. See also T.D. 5565, § 82.107(a), 1947-1 CUM. BULL. 125, 136-7.

The third limitation serves to curtail the total credit allowable on account of the U.S. $26,699.56 in Dominion succession duties to an amount not exceeding the total Federal estate tax resulting from the inclusion in Absalom's estate of the property located within, and subjected to, tax by Canada.[34] This sum, Y, is an amount which bears the same ratio to the total Federal estate tax of U.S. $87,700—computed after the allowance of the maximum permissible credit for estate taxes paid New York State (but before allowance for any credit for Dominion succession taxes)[35]—as the value of the property situated in Canada and subjected to tax in both countries (U.S. $100,000) bears to the value of the gross estate for Federal tax purposes, reduced by the value of the property specifically bequeathed to Achitophel (U.S. $500,000—U.S. $100,000 = U.S. $400,000).[36] Or expressed mathematically, Y, the total Federal estate tax attributable to that part of the estate which is subjected to both Dominion and to Federal taxation is

$$\frac{\text{U.S. \$100,000}}{\text{U.S. \$400,000}} \times \text{U.S. \$87,700.}$$

$$Y = \text{U.S. \$21,925.}$$

In summation, the first limitation confines the maximum allowable credit to a sum not in excess of C$75,944.16, the sum paid in Dominion succession duties. The second limitation reduces that figure of C$75,944.16 to C$25,680.06, being that portion of the total Dominion tax attributable to property taxable both in Canada and in the United States. And the third limitation serves further to reduce the C$25,680.06 to U.S. $21,925, the Federal estate tax generated by the inclusion in Absalom's estate of assets also situated within and taxed by Canada.

The Federal estate tax before allowance of the credit under the Convention is U.S. $87,700, which, when reduced by the maximum allowable credit of U.S. $21,925, results in a net Federal tax payable of U.S. $65,775. The overall death taxes payable by Absalom's estate then amount to U.S. $144,734.14, consisting of U.S. $65,775 in Federal estate taxes and U.S. $78,959.14 in Dominion succession duties.

Maximization of the Credit

Substitution of United States securities. A substantial saving in the overall death taxes could have been effected by intelligent estate planning, without altering the decedent's basic dispositive aims and without any change in the composition of his estate. Let us assume that stocks in United States corporations, with a value of U.S. $100,000, were specifically bequeathed to Achi-

34. Convention, Art. V, ¶ 1.

35. Convention, Art. V, ¶ 3.

36. See T.D. 5455, § 82.7, 1945 CUM. BULL. 381, 391. See also T.D. 5565, §§ 82.107(a), (b), 1947-1 CUM. BULL. 125, 137, 139-40.

tophel instead of stock of like value in Canadian corporations. Here an over-all tax savings of U.S. $13,645.70, or roughly 9.4%, would result. An investment in Canadian corporations of U.S. $100,000 would replace an equivalent investment in United States corporations as part of the residual estate. Thus, under the second limitation, the Dominion taxes attributable to David's succession to property taxable in both countries would be

$$\frac{\text{C\$192,360}}{\text{C\$292,360}} \times \text{C\$83,907.32},^{37} \text{ equaling C\$55,207.32}$$

or U.S. $57,399.05.

And under the third limitation, the Federal estate tax attributable to the doubly-taxed property would total

$$\frac{\text{U.S. \$200,000}}{\text{U.S. \$400,000}} \times \text{U.S. \$87,700},^{38}$$

equaling U.S. $43,850.

The operation of the third limitation results in the allowance of the smaller figure, U.S. $43,850, as the credit, which, when set off against the Federal estate tax of U.S. $87,700 otherwise payable, leaves a net Federal estate tax of U.S. $43,850. This figure, plus the Dominion succession tax of U.S. $87,238.44, yields an over-all death tax burden of U.S. $131,088.44 as compared to the $144,734.14 over-all death tax which resulted under Absalom's will as actually drawn.

Substitution of a general cash bequest. A somewhat different over-all tax result would follow if we assume that Absalom's will left a *general* cash bequest to the charitable organization of U.S. $100,000 rather than a specific bequest of Canadian or United States corporate stock of equal value. Since here the grant to Achitophel is not *specifically* bequeathed to a charitable organization, this general cash bequest would be included in the computation of the ratios set up by the second and third limitations. Under the second restriction, a credit would be allowed with respect to Dominion death duties allocable to that pro-rata share of the non-realty assets which must be assumed to move to charity—despite the fact that this pro-rata share is not subject to Federal estate tax. Yet under the third limitation the Canadian taxes attributable to this share are excluded from the credit. The computation follows.

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37. See statutory provisions cited note 28 *supra*.

Initial rate of duty on C$292,360.	8.9%
Additional rate of duty on C$292,360.	19.8%
Total rate of duty on C$292,360.	28.7%
C$292,360. x 28.7% =	C$83,907.32

38. See T.D. 5565, § 82.107(b), Example (3), 1947-1 CUM. BULL. 125, 140.

The total Dominion tax would be C$77,498.47 (U.S. $80,575.16), of which C$9,923.28 [39] would be payable on C$48,406.24, which is that portion of the estate assets situate in Canada and attributable to Achitophel's succession, while C$67,575.19 [40] would be payable on C$243,953.76, which is that portion of the Canadian assets attributable to David's succession. The portion of the Dominion succession duties attributable to The Achitophel succession, other than its proportionate part of the British Columbian timber tract, would amount to

$$\frac{\text{C\$48,406.24} - \left(\frac{\text{C\$ 48,406.24}}{\text{C\$292,360.00}} \times \text{C\$100,000}\right)}{\text{C\$ 48,406.24}} \times \text{C\$9,923.28,}$$

equaling C$6,529.08 (U.S. $6,788.28).

The Dominion duties attributable to David's succession to property taxed in both countries would amount to

$$\frac{\text{C\$243,953.76} - \left(\frac{\text{C\$243,953.76}}{\text{C\$292,360.00}} \times \text{C\$100,000}\right)}{\text{C\$243,953.76}} \times \text{C\$67,575.19,}$$

equaling C$44,461.50 (U.S. $46,226.62).

The maximum credit allowable under the second limitation would, therefore, be U.S. $53,014.90, the sum of the two foregoing products.

The Federal estate tax attributable to the property situate in Canada and subject to tax by both countries would amount to

$$\frac{\text{U.S. \$200,000}}{\text{U.S. \$500,000}} \times \text{U.S. \$87,700,}$$

equaling U.S. $35,080.

Under the third limitation the credit would be restricted to this figure of U.S. $35,080, and the net Federal estate tax payable would amount to U.S. $52,620.

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39. See statutory provisions cited note 28 *supra*.

Initial rate of duty on C$292,360.	8.9%
Additional rate of duty on C$48,406.24.	11.6%
Total rate of duty on C$48,406.24.	20.5%
C$48,406.24. x 20.5% =	C$9,923.28

40. See statutory provisions cited note 28 *supra*.

Initial rate of duty on C$292,360.	8.9%
Additional rate of duty on C$243,953.76	18.8%
Total rate of duty on C$243,953.76	27.7%
C$243,953.76 x 27.7% =	C$67,575.19

This net Federal estate tax plus succession duties of U.S. $80,575.16 payable to the Dominion would result in payment of over-all death taxes of U.S. $133,195.16.

Situs Rules under the Convention

The Dominion imposes succession duties only on such property belonging to a deceased citizen or domiciliary of the United States as may be situate within Canada.[41] The United States-Canadian Death Tax Convention lays down elaborate rules for ascertaining the situs of the most commonly encountered types of property. For the purposes of the Convention, shares of stock, as well as corporate bonds and debentures, are conclusively deemed located at the place where the company is incorporated.[42] Partnership interests have their situs "at the place where its business is principally carried on."[43] Bank accounts are located at the particular branch at which the account is kept.[44] Bearer securities issued by any government, municipality, or public authority are deemed situate at the place of their physical location at the time of their owner's death, but any registered security issued by such obligors are considered to be located at the place where registered as provided by the issuing authority.[45] Insurance and annuity contract proceeds are deemed situate where the payments are to be made, but in the absence of specific provision as to place of payment, the proceeds are located where the issuer is incorporated, or if the issuer is not a company, then where the issuer resides.[46] Judgment debts are situate where recorded,[47] while other debts—including bills of exchange and promissory notes, either secured or unsecured, and whether or not under seal—are situate at the debtor's residence or, for a corporate debtor, at its place of incorporation.[48]

The specificity of these situs rules greatly eases the interpretation and application of the Convention. Unfortunately, different situs rules may be applicable under the credit provisions contained in the Internal Revenue Code[49] or for the purpose of determining the liability of the estate for provincial succession duties. Because of the greater certainty of results under the Convention rules, the existence of these differences serves at once to enhance the usefulness of the Convention for estate planning while considerably reducing that of the potentially broader credit provided for in the Code.

41. See note 7 *supra.*
42. Convention, Art. II, ¶ (f).
43. *Id.* ¶ (h).
44. *Id.* ¶ (d).
45. *Id.* ¶ (e).
46. *Id.* ¶ (g).
47. *Id.* ¶ (n).
48. *Id.* ¶ (c).
49. INT. REV. CODE §§ 813(c), 936(c). Applicable with respect to estates of decedents dying after October 20, 1951. Revenue Act of 1951, § 603(e), 1951 U.S. CODE CONG. SERV. 463.

CREDIT ALLOWABLE UNDER THE INTERNAL REVENUE CODE

The Code Provisions

Quite apart from any credit allowable under the Death Tax Convention with Canada, the Internal Revenue Code for the first time now provides for a credit against the Federal estate tax otherwise payable by the estate of a deceased citizen, "of any estate, inheritance, legacy, or succession taxes actually paid to any foreign country in respect of any property situated within such foreign country and included in the gross estate. . . ."[50] This credit, which is allowable if larger than the credit available under any death tax convention,[51] may also be claimed by the estate of a subject or citizen of a foreign country which, in imposing such taxes, "allows a similar credit in the case of a citizen of the United States resident in such country."[52]

Limitations upon the Credit

The second and third limitations upon the credit allowable under the Convention with Canada are also applicable under the Code;[53] the purpose of both credit provisions is the avoidance of double taxation.[54] But Convention and Code credit provisions are not identical. In one respect, the Convention limitations upon the allowable credit are more restrictive than those imposed by the Code: the Convention allows credit only for Dominion succession duties,[55] while the Code credit embraces provincial succession duties as well.[56] Moreover, the application of credit limitations under Code and Convention differ because of divergent situs rules under the two authorities.[57] In addition, the Code articulates the precise methods for application of credit limitations more clearly than does the Convention.

As a counterpart of the second Convention limitation, the Code provides that the total credit for succession taxes paid a foreign country shall not exceed an amount which bears the same ratio to the actual tax paid such foreign country as the value of the property within such country subjected to tax and included in the gross estate bears to the value of all property subjected to such a tax.[58] Under the counterpart to the third limitation, the Code credit may not exceed an amount which bears the same ratio to the Federal

50. INT. REV. CODE §§ 813(c), 936(c).

51. SEN. REP. No. 781, pt. 2, 82d Cong., 1st Sess. 104 (1951).

52. INT. REV. CODE §§ 813(c), 936(c).

53. INT. REV. CODE §§ 813(c)(2), 936(c)(2).

54. SEN. REP. No. 781, 82d Cong., 1st Sess. 89 (1951). See also STAFF OF THE JOINT COMMITTEE ON INTERNAL REVENUE TAXATION, SUMMARY OF THE PROVISIONS OF THE REVENUE ACT OF 1951 AS AGREED TO BY THE CONFEREES 58 (1951).

55. See note 15 *supra*.

56. SEN. REP., *supra* note 51, at 104.

57. *Compare* INT. REV. CODE §§ 813(c)(1), 936(c)(1), 862, 863, *with* Convention, Art. II.

58. INT. REV. CODE §§ 813(c)(2)(A), 936(c)(2)(A).

estate tax (less appropriate credits for gift tax and state inheritance taxes) as the value of the property included in the decedent's gross estate but also situate and subject to taxation within such foreign country bears to the value of the decedent's entire gross estate reduced by the amount of any deductions for property previously taxed or bequeathed to charity, or property bequeathed to a surviving spouse for which a marital deduction is allowable.[59]

In arriving at the property values to be employed in the first of these ratios, the Code provides that the foreign tax values are to be employed.[60] In applying the second ratio, however, the Secretary of the Treasury is directed to prescribe by regulation the extent to which the value of the property subject to tax in both countries will be reduced to account for the previously mentioned deductions from the gross estate.[61] No one, of course, can speak authoritatively on just how these deductions must be computed prior to the issuance of these regulations. It is believed, however, that where the will specifically provides that charitable bequests and deductible grants to a surviving spouse shall not be paid out of assets located and taxable within Canada, no reduction in the numerator of the statutory formula—and thus no diminution of computed credit—may properly be required.[62]

Situs Rules under the Code

The credit allowable under the Code is specifically confined to foreign death duties paid "in respect of any property situated within such foreign country. . . ."[63] The determination of such situs is to "be made in accordance with the rules applicable under part III of this subchapter in determining whether the property is situate within or without the United States."[64] Unfortunately the situs rules laid down in part III offer too narrow a base upon which to erect the bold superstructure contemplated by the new Code provisions.

The actual situations covered by part III are decidedly limited. Stock in a corporation organized under the laws of the United States, any state, territory, or the District of Columbia, belonging to a nonresident alien is deemed situate within the United States.[65] The second rule is that property which is the subject of revocable transfers or transfers made in contemplation of death situate within the United States at the time of transfer or the transferor's death is considered to be located in the United States.[66] Since the Code credit is specifically limited to foreign estate taxes paid on property

59. INT. REV. CODE §§ 813(c)(2)(B), 936(c)(2)(B).
60. INT. REV. CODE §§ 813(c)(3)(A), 936(c)(3)(A).
61. INT. REV. CODE §§ 813(c)(3)(B), 936(c)(3)(B).
62. *Cf.* William Edward Muir, 10 T.C. 307, 311 (1948), *acq.*, 1948-2 CUM. BULL. 3, *aff'd* and *remanded*, 182 F.2d 819 (4th Cir. 1950).
63. INT. REV. CODE §§ 813(c), 936(c).
64. INT. REV. CODE § 813(c)(1). See also INT. REV. CODE § 939(c)(1).
65. INT. REV. CODE § 862(a).
66. INT. REV. CODE § 862(b).

situate in a foreign country, these first two rules laid down by part III shed but feeble light. Other part III rules provide that proceeds of insurance on the life of a nonresident alien are not deemed situate within the United States,[67] nor is money deposited in a bank by a nonresident alien not engaged in business in the United States at the time of his death.[68] Also deemed property not within the United States are works of art belonging to a nonresident alien imported into this country solely for exhibit and loan to a public gallery or museum.[69] And apart from the situs provisions of part III, it has been judicially established by the leading case of *Burnet v. Brooks*[70] that shares of stock in foreign corporations and bonds issued by foreign corporations belonging to a nonresident alien have a situs within the United States if physically located therein at the time of the owner's death.

Strictly construed, the "rules" of part III offer no guidance of a substantial nature for the solution of the situs problems posed by the new credit provisions of the Code. If a broader approach is taken which looks to the "principles"[71] to be derived from part III, the results are scarcely happier. If stock in a domestic corporation belonging to a nonresident alien is deemed by statute to be located within the United States,[72] does it follow that stock in an Ontario corporation belonging to a citizen or domiciliary of the United States is to be viewed as located in Ontario, even though physically kept in New York City where such corporation maintains a share transfer office? Even if the answer be yes, no credit will be available, because under Canadian law such shares are not deemed situate within Ontario for the purpose of that province's succession duty.[73] Or, again, if shares in a foreign corporation have a situs in the United States because physically located here, does it follow that shares of United States Steel located in a Toronto safe deposit box have a Canadian situs? Ontario answers this question in the negative,[74] and under the Convention so does the Dominion.[75] Consequently no double taxation can result, and hence no credit is to be had.

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67. INT. REV. CODE § 863(a).

68. INT. REV. CODE § 863(b).

69. INT. REV. CODE § 863(c).

70. 288 U.S. 378 (1933).

71. "The credit is not allowable for any portion of the foreign tax which is paid with respect to property situated outside the territory of the foreign country imposing such tax. The determination of the country in which property is situated for the purposes of determining whether the credit is allowable is to be made in accordance with the principles applicable in determining whether property is situated within or without the United States for purposes of the imposition of the Federal estate tax on the estate of a nonresident not a citizen of the United States." SEN. REP. No. 781, pt. 2, 82d Cong., 1st Sess. 104-105 (1951).

72. INT. REV. CODE § 862(a).

73. Rex v. Williams, [1942] A.C. 541 (P.C.); Treasurer of Ontario v. Blonde, [1946] 4 D.L.R. 785 (P.C.).

74. *Re* Mathews, [1938] 2 D.L.R. 763 (York County Surrog. Ct., Ont. 1937).

75. Convention, Art. II, ¶ (f).

The new Code credit provisions clearly need legislative clarification, especially as to the situs problem. Yet some of the difficulties now inherent in attempts to construe this legislation may ultimately be resolved by Treasury regulation. Until authoritative clarification has been achieved either by legislation or through the administrative process, the skillful estate planner would do well to confine his reliance on an estate tax credit to that available under the Convention.

Provincial Succession Duties

The Statutory Pattern

Although all ten of the Canadian provinces [76] at one time levied their own succession duties,[77] now, under five-year tax rental agreements [78] with the Dominion (which have received their first renewal in 1952 [79]), all but two of the provincial governments have suspended the imposition of succession duties in return for a specified share of total Dominion collections. The two provinces which continue to levy their own succession duties—Ontario and Quebec—are, however, the most important financially and politically; over 60 percent of Canada's total population reside within their borders.[80]

The elaborate situs rules laid down in the Supplementary United States-Canadian Death Tax Convention,[81] which specifically control the location of all kinds and types of property, have no necessary relevance to the determination of the liability of those same types of property to Ontario or Quebec succession duties. Where, however, the same property is subjected both to provincial and Dominion succession taxation, a credit is available against the Dominion tax; this credit equals the Dominion tax multiplied by the lesser of two fractions: (1) one half; (2) the total provincial duties paid divided by the total duty.[82] Imposition of provincial duties may thus increase the tax on the estate of a nonresident decedent. The total Canadian tax will be increased because the credit against the Dominion duties does not equal the provincial tax. And under the Convention only Dominion taxes are available

76. Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan.

77. Even the Yukon and Northwest Territories once levied succession duties, the former under the Succession Duty Ordinance of the Yukon Territory, assented to May 23, 1934, as amended April 30, 1945, and repealed July 12, 1947, and the latter under the Succession Duty Ordinance of the Northwest Territories, c. 5, 1903, c. 116, 1905 Consolidation of Northwest Territories Ordinances, and repealed by c. 11, 1947, assented to and effective October 22, 1947.

78. The first agreements were effective with respect to the succession of persons dying in the period commencing on April 1, 1947, and ending on March 31, 1952.

79. The current agreements were extended for five years commencing April 1, 1952. Only Nova Scotia has not yet extended the agreement, and even that province has announced its intention of so doing.

80. Wall Street Journal, Oct. 8, 1952, p. 1, col. 5.

81. Art. II.

82. Section 11A(2), The Dominion Succession Duty Act, as amended, *supra* note 10.

as a credit against the Federal estate tax;[83] allowance of the credit under the Code, while more liberal in this respect, is subject to hazards inherent in the situs problem.

There are, however, methods by which an informed nonresident investor may avoid the Ontario and Quebec succession duties, thus effecting a net tax saving to his estate. Because these methods derive from certain peculiar limitations upon the scope of the provincial taxing power, coupled with the as yet uncodified situs rules prevailing for provincial purposes, a brief examination of the Canadian law on these points is necessary.

The Direct Taxation Limitation

Under the organic act creating and defining the present federal system in Canada—the British North American Act of 1867 [84]—the provincial governments' taxing powers are confined to the levying of "[d]irect taxation within the Province in order to the raising of a revenue for Provincial purposes."[85]

The courts, called upon to classify a wide variety of provincial taxes either as direct and therefore *intra vires,* or as indirect and void,[86] noted that prior to the enactment of the British North American Act this now legally necessary "division of taxation into direct and indirect belong[ed] solely to the province of political economy so far as the taxation in Great Britain, or Ireland or in any of our colonies is concerned."[87] Faced with the necessity of selecting a tax definition from among the competing and often mutually inconsistent definitions of the political economists, the Judicial Committee of the Privy Council turned first to that of John Stuart Mill.[88]

The brevity and conciseness of Mill's definition proved initially attractive to the courts,[89] his view being that "a direct tax is one which is demanded direct from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expecta-

83. Convention, Art. I, ¶ 1; T.D. 5455, § 82.2, 1945 CUM. BULL. 381, 386.

84. 30 & 31 VICT., c. 3.

85. *Id.* § 92(2). Although taxing powers are thus conferred upon the Canadian provinces "in words which had the appearance of simplicity," the Privy Council itself admits that "the resulting decisions have not been free from criticism." Burland v. The King, Alleyn-Sharples v. Barthe, [1922] A.C. 215, 220 (P.C. 1921).

86. "The pith of the matter seems to be that, the powers of the provincial Legislature being strictly limited to 'direct taxation within the province' . . ., any attempt to levy a tax on property locally situate outside the province is beyond their competence." Lord Collins speaking for the Judicial Committee of the Privy Council in Woodruff v. Attorney-General for Ontario, [1908] A.C. 508, 513 (P.C.).

87. Lord Moulton speaking for the Privy Council in Cotton v. Rex, [1914] A.C. 176, 190 (P.C. 1913).

88. Attorney-General for Quebec v. Reed, 10 A.C. 141, 143 (P.C. 1884).

89. *Ibid.*; Bank of Toronto v. Lambe, 12 App. Cas. 575 (P.C. 1887); Brewers and Malsters' Ass'n of Ontario v. Attorney-General for Ontario, [1897] A.C. 231 (P.C.); Rex v. Cotton, [1914] A.C. 176 (P.C. 1913).

tion and intention that he shall indemnify himself at the expense of another, such as the excise or customs."[90]

Applying this general definition the Privy Council in 1884 was readily able to classify a Quebec impost of ten cents "on every exhibit produced in Court in any action depending therein" as *ultra vires* and void.[91] Since court costs are normally borne by the unsuccessful litigant, the legislature must have intended that the successful party would "indemnify himself at the expense of another" for this tax on evidentiary documents. On the other hand, an Ontario statute requiring brewers and distillers within the province to take out a license was upheld as imposing direct taxation, since "the tax is demanded from the very person whom the Legislature intended or desired to pay it."[92] A similar view was reached with respect to a Quebec tax on certain commercial corporations doing business within the province, the amount of tax varying with the paid-in capital and number of offices maintained, irrespective of the location of the corporation's head office.[93]

This initial era of judicial satisfaction with Mill's definitions of direct and indirect taxes[94] did not long prevail. It was soon felt that its "very excellence" as an economist's definition, *i.e.*, "the accuracy with which it contemplates and embraces every incidence of the thing defined . . . impairs its value for the purpose of the lawyer."[95] Further analysis only served to reveal the essential vacuity of the definition, since even customs duties, specifically cited by Mill as an example *par excellence* of an indirect tax, are not passed on by one who imports for his own use or consumption.

A classification which, because of variant subjective taxpayer purposes and intentions, rendered a tax direct and valid as to one class of persons subject to it but indirect and *ultra vires* as to other classes, proved at length unworkable. By 1927 the Privy Council was prepared in effect to jettison not only Mill but his fellow economists as well.[96] In that

90. MILL, POLITICAL ECONOMY, bk. V., c. 3 (1848).

91. "The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at that time the ultimate incidence is uncertain, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the [British North American Act]." Attorney-General for Quebec v. Reed, 10 App. Cas. 141, 144 (P.C. 1884).

92. Brewers and Maltsters' Ass'n of Ontario v. Attorney-General for Ontario, [1897] A.C. 231 (P.C.).

93. Bank of Toronto v. Lambe, 12 App. Cas. 575 (P.C. 1887).

94. "Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase 'direct taxation' in s. 92 of the British North American Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill and that this question is no longer open to discussion." Cotton v. Rex, [1914] A.C. 176, 193 (P.C. 1913).

95. Bank of Toronto v. Lambe, 12 App. Cas. 575, 582 (P.C. 1887).

96. Halifax v. Estate of J. P. Fairbanks, [1928] A.C. 117 (P.C. 1927). *But cf.* Provincial Treasurer of Alberta v. Kerr, [1933] A.C. 710, 722-3 (P.C.).

year it had before it a Halifax business tax on every occupier of land used for purposes of trade or business for gain, even where the occupier rented to the Crown and presumably passed this tax on to his tenant via an increased rental. In upholding this tax as direct, Viscount Cave, speaking for the Privy Council, limited the application of Mill's definition to the determination of the proper classification of "any new or unfamiliar tax which may be imposed."[97] The definition, however, "cannot have the effect of disturbing the established classification of the old and well known species of taxation, and making it necessary to apply a new test to every particular member of those species."[98] In future the classification of all but "new forms of taxation" as direct or indirect was declared to turn upon "the nature and general tendency of the tax and not its incidence in particular or special cases."[99] South of the border, observers may be allowed to question whether this new Kantian *"ding an sich"* approach to the problem of classifying taxes as direct or indirect according to "reason and nature" is other than an "anodyne to the pains of reasoning."[100] Yet however metaphysical its construction, this direct-indirect distinction relates significantly to provincial death tax powers.

"Situate within the Province"

Provincial power to levy a succession tax upon property passing from a decedent, resident or nonresident, has been successfully limited to "property situate within the province."[101] A tax on property situate without the province can only be collected vicariously from an executor, administrator, or heir jurisdictionally within the taxing authority. But to collect such a tax thus indirectly would render the exaction *ultra vires*.[102] Thus in order to satisfy the "[d]irect taxation within the Province" provision of the British North America Act,[103] the rules for determining the location of all kinds of property must be ascertained.

97. Halifax v. Estate of J. P. Fairbanks, [1928] A.C. 117, 125 (P.C. 1927).

98. *Ibid.*

99. *Id.* at 126.

100. Judge Learned Hand's phrase for judicial befuddlement with "such vague alternatives as 'form' and 'substance'." Commissioner v. Sansome, 60 F.2d 931, 933 (2d Cir. 1932).

101. Lambe v. Manuel, [1903] A.C. 68 (P.C. 1902); Woodruff v. Attorney-General for Ontario, [1908] A.C. 508 (P.C.); The King v. Lovitt, [1912] A.C. 212 (P.C. 1911); Burland v. The King, Alleyn-Sharples v. Barthe, [1922] A.C. 215 (P.C. 1921); Provincial Treasurer of Manitoba v. Bennett, [1937] 2 D.L.R. 1 (Can. Sup. Ct.), *affirming* [1936] 2 D.L.R. 291 (Man. Ct. App.); *Re* Thoburn: Ivey v. The King, [1939] 1 D.L.R. 631 (Que. K.B., Appeals Side, 1938); *Re* Hatch and Fanny Farmer Candy Shops, Inc., [1944] O.W.N. 716 (Ont. Ct. App.); Treasurer of Ontario v. Blonde, [1946] 4 D.L.R. 785 (P.C.). *Cf.* Ontario Succession Duty Act, REV. STAT. ONT., c. 378, § 5(a) (1950), and Quebec Succession Duties Act, REV. STAT. QUE., c. 80, § 4 (1941).

102. Provincial Treasurer of Alberta v. Kerr, [1933] A.C. 710, 722 (P.C.); Burland v. The King, Alleyn-Sharples v. Barthe, [1922] A.C. 215 (P.C. 1921).

103. 30 & 31 VICT., c. 3, § 92(2).

A distinction has been drawn between situs for the purpose of determining heirship to property, derived from obscure, medieval, and presumably "unwitty" jurisdictional contests between the Archdioceses of Canterbury and York, and situs for the purpose of imposing provincial succession duties.[104] Whatever conflict of law rules may govern for the former purpose, we are here concerned solely with the highly particularized rules governing situs for provincial succession tax purposes.

The basic concepts in determining provincial tax situs, first laid down[105] in "what their Lordships take leave to describe as a very luminous judgment of the Supreme Court Chief Justice Duff"[106] and repeatedly followed thereafter,[107] are three in number: (a) property can have but one situs,[108] which (b) must be ascertained by "reference to some principle or coherent system of principles" derived from the common law,[109] and it follows, of course, that (c) a provincial legislature is not competent to alter, for tax purposes, the situs so ascertained.[110] In proliferating this system of coherent principles of common law derivation, the courts appear in essence to have settled upon the principle that situs is the place where the property can be effectively dealt with. The easiest case is that of real estate, which can be effectively dealt with only where actually located, the situs for succession tax purposes thus coinciding with the devolutionary situs rule. Hence, where a nonresident of Canada dies seized of real estate located in either Ontario or Quebec, a provincial succession tax is payable thereon because of the fact that such property is "situate within the province." A like rule governs tangible chattels, such as furniture, motor cars, or jewelry; their situs is their physical location at the time of their owner's death.

The situs of intangible personal property, however, may not be ascertained so readily. The efficacy of *mobilia sequuntur personam* in resolving doubts as to the situs of property for inheritance purposes appears not to demand a

104. Viscount Maugham speaking for the Privy Council in Rex v. Williams, [1942] A.C. 541, 555-6 (P.C.). See also Provincial Treasurer of Alberta v. Kerr, [1933] A.C. 710, 722 (P.C.).

105. The King v. National Trust Co., [1933] 4 D.L.R. 465 (Can. Sup. Ct.).

106. Rex v. Williams, [1942] A.C. 541, 558 (P.C.), citing *National Trust Co., supra* note 105.

107. Rex v. Williams, [1942] A.C. 541 (P.C.); The King v. Globe Indemnity Co. of Canada, [1945] O.W.N. 172 (Ont. Ct. App.), *dismissing appeal* from [1944] 3 D.L.R. 84 (Ont. High Ct. of Just.).

108. The rule as restated in Rex v. Williams, [1942] A.C. 541, 559 (P.C.), is that "property, whether movable or immovable, can, for the purposes of determining situs among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation." What a delightfully naive approach for those plagued with multiple estate tax liability in this country! *Cf.* Texas v. Florida, 306 U.S. 398 (1939); Tweed & Sargent, *Death and Taxes are Certain—But What of Domicile,* 53 HARV. L. REV. 68 (1939).

109. The King v. National Trust Co., [1933] 4 D.L.R. 465, 467 (Can. Sup. Ct.).

110. *Ibid.*

similar situs rule for provincial succession duty liability.[111] Situs for provincial death tax purposes must be approached atomistically, with each major category of intangible personal property considered separately.

Debt. In general, a simple contract debt is deemed located where the debtor resides, since it is believed that there the debt may be effectively dealt with, *i.e.*, enforced.[112] Where such debt, however, is evidenced by a negotiable instrument, then the situs of the debt is determined by the physical location of the document evidencing it.[113] A judgment debt, on the other hand, is considered located where the judgment was recorded.[114] A specialty debt—a category embracing not only an obligation under seal but also a Dominion, provincial, or other governmental bond or obligation created or authorized by law whether or not under seal—is deemed situate where physically located at the time of the owner's death, such *bona notabilia* being treated as though tangible chattels.[115]

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111. "Their Lordships have come to the conclusion that the existence in Buffalo at the date of death of certificates in the name of the testator endorsed by him in blank must be decisive of the present case. They must reject the notion that the domicile of the deceased had anything to do with the situs of the property, or that the maxim *'mobilia sequuntur personam'* has any relevance." Rex v. Williams, [1942] A.C. 541, 560 (P.C.); *accord,* Provincial Treasurer of Alberta v. Kerr, [1933] A.C. 710, 722 (P.C.); Rex v. Lovitt, [1912] A.C. 212 (P.C. 1911).

112. "The property consisted of simple contract debts, and as such could have no local situation other than the residence of the debtor where the assets to satisfy them would presumably be." Rex v. Lovitt, [1912] A.C. 212, 218 (P.C. 1911); The King v. National Trust Co., [1933] 4 D.L.R. 465, 467 (Can. Sup. Ct.).

113. "It is a simple contract debt and, as such its situs, at least for the purposes of this case, would be the jurisdiction where the debtor is domiciled. . . . But there is a well recognized exception to that rule, and that is that certain instruments capable of being transferred by delivery, and of being sold for money, in the jurisdiction where they are found and without it being necessary to do any act outside of that jurisdiction in order to render the transfer of them valid, are considered as instruments of a chattel nature." Provincial Treasurer of Manitoba v. Bennett, [1937] 2 D.L.R. 1, 3-4 (Can. Sup. Ct.). It should also be noted that "the rule applies, not only to negotiable instruments so-called, but also to instruments which are marketable securities, salable and transferable by delivery only, without it being necessary to do any act outside the jurisdiction where they are found, in order to render their transfer valid." *Id.* at 8. "Promissory notes are exceptions to the general rule that a simple contract debt is situate where the debtor resides." *Re* Mathews, [1938] 2 D.L.R. 763, 764 (York County Surrog. Ct., Ont., 1937). See also The King v. Sanner and Bank of Montreal, 74 S.C. 42, 47 (Que. Super. Ct. 1936).

114. The King v. National Trust Co., [1933] 4 D.L.R. 465, 467-8 (Can. Sup. Ct.).

115. The King v. National Trust Co., [1933] 4 D.L.R. 465, 467-473 (Can. Sup. Ct.); Treasurer v. Pattin, 22 Ont. L.R. 184 (Ont. Ct. App. 1910); *Re* Moore, [1937] O.W.N. 304 (Ont. High Ct. of Just.). See also Toronto General Trusts Corp. v. The King, [1919] A.C. 679 (P.C.) (dealing with a specialty issued in duplicate); Woodruff v. Attorney-General for Ontario, [1908] A.C. 508 (P.C.); Royal Trust Co. v. Attorney-General for Alberta, [1930] A.C. 144 (P.C. 1929); The King v. Sanner and Bank of Montreal, 74 S.C. 42 (Que. Super. Ct. 1936); Falconbridge, *Situs and Transfer of Intangibles,* 13 CAN. B. REV. 265, 267-75 (1935); Hawkes, *Death Duties and Double Taxation: Canada and the United States Compared,* 5 NAT. TAX. J. 145, 151 (1952); Monacelli, *Canadian Taxes on Yankee Investments,* 29 TAXES 299 (1951).

The seeming simplicity of the "where property may be effectively dealt with" rule vanishes, however, where a debt may in fact be effectively dealt with in more than one place. Such a case is posed where a simple contract creditor is authorized by the terms of the contract to collect at any of the obligor's offices, and these offices are maintained in more than one jurisdiction.[116] A specialty debt, however, even though payable in multiple jurisdictions, retains its situs at the place of its physical location.[117] Again, a judgment debt may be registered in the courts of other jurisdictions and in consequence may be "effectively dealt with," *i.e.*, collectable through judicial process, in numerous places. In the case of branch banking, which prevails throughout Canada, the situs of an account normally is the particular branch in which the deposit is maintained.[118] Under certain conditions, however, demand may properly be made at the home office. The "effectively dealt with" dilemma becomes even clearer in the case of past due dividends not yet collected which are payable at any of the company's several dividend paying offices or in the case of interest payable both at the head office, say in Toronto, and at the debtor's New York City agency.

The "rational principles of the common law" have not yet been effectively invoked to solve these situs puzzles. It seems not improbable, however, that rules similar to those which have evolved respecting the situs of shares of stocks transferable at more than one registry office may become applicable to non-specialty debts which are capable of being effectively dealt with in more than one jurisdiction.[119]

Stocks. Even more complex are the provincial succession tax situs rules pertaining to shares of corporate stock. Where a decedent dies possessed of

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116. *In re* The Succession Duty Act, 1934, *In re* Corlet Estate, [1939] 2 W.W.R. 478 (Sup. Ct. Alberta). Here the deceased died domiciled in the Isle of Man but resident in Alberta owning three life insurance policies issued by the Metropolitan Life Ins. Co. for $25,000 each, payable to Isle of Man Bank as trustee for trusts of which the policies constituted part of the corpora. Although the insurer's head office was at Ottawa, registered offices at which the payment of policies would be made were also maintained in Alberta. The insurance proceeds were held situate within Alberta and subject to tax therein. See also *In re* The Succession Duty Act, *In re* Lawton Estate, [1944] 2 W.W.R. 265 (K.B. Manitoba).

117. Royal Trust Co. v. Attorney-General for Alberta, [1930] A.C. 144, 150 (P.C. 1929).

118. Rex v. Lovitt, [1912] A.C. 212 (P.C. 1911); The King v. Sanner and Bank of Montreal, 74 S.C. 42, 48 (Que. Super. Ct. 1936). Where a bank account is evidenced by a negotiable deposit receipt, the situs of such account is determined by the physical location of such receipt. Provincial Treasurer of Manitoba v. Bennett, [1937] 2 D.L.R. 1 (Can. Sup. Ct.).

119. *See* Provincial Treasurer of Manitoba v. Bennett, [1937] 2 D.L.R. 1, 3-4, 8 (Can. Sup. Ct.). The Privy Council's insistence upon the differences between debt and equity interests for tax situs purposes, Royal Trust Co. v. Attorney-General for Alberta, [1930] A.C. 144, 151 (P.C. 1929), are not impressive where the issue is one of choosing between two or more jurisdictions within which the property may be effectively dealt with.

stock in a corporation, the shares of which are transferable only at a registry or transfer office in Ontario, for example, then such shares are deemed to be "situate within,"[120] and therefore taxable by, that province, since only within Ontario may the shares "be effectively dealt with."[121] This latter phrase means " 'where the shares can be effectively dealt with as between the shareholder and the company, so that the transferee will become legally entitled to all the rights of a member,' *e.g.*, the right of attending meetings and voting and of receiving dividends."[122]

Where shares may be transferred with equal effectiveness at registry offices maintained in different provinces or countries, then selection of a provincial tax situs for such shares must be made on a "rational ground."[123] Bluntly stated, the rule seems to be that where shares of corporate stock belonging to a decedent may be transferred on company books maintained within Ontario or Quebec (the provinces levying succession duties) and may also be transferred elsewhere without subjecting the succession to provincial taxation, the courts consider it in effect "irrational" to presume that the first course will be followed.[124]

The leading case of *Rex v. Williams*[125] illustrates this approach. The case involved the liability for Ontario succession duty of some 10,200 shares of the capital stock of Lake Shore Mines, Ltd., a company created by letters patent issued under the Ontario Companies Act, and standing in the name of the decedent, Alexander Duncan Williams, a citizen of the United States who was, at the time of his death, July 22, 1934, a resident of Buffalo, New York. The shares in question were physically located in Buffalo, were endorsed in blank, and were transferable both at head office in Ontario and in Buffalo.

120. Erie Beach Co. v. Attorney-General for Ontario, [1930] A.C. 161 (P.C. 1929).

121. "This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with?" Brassard v. Smith, [1925] A.C. 371, 376 (P.C. 1924); The King v. Globe Indemnity Co., [1945] O.W.N. 172 (Ont. Ct. App.).

122. Rex v. Williams, [1942] A.C. 541, 558 (P.C.); Erie Beach Co. v. Attorney-General for Ontario, [1930] A.C. 161 (P.C. 1929).

123. Rex v. Williams, [1942] A.C. 541, 560 (P.C.).

124. "Putting aside the question of liability to duty, there were clear advantages in favour of Buffalo as the place of transfer. The consent of the directors was not required, and the matter of exchange was at times of considerable importance, and so, likewise, might be the mere transmitting across the international border of the share certificate. In the event of a sale of the shares within the United States, it was an advantage to be able to complete the sale within that country and under its laws." The King v. Globe Indemnity Co., [1945] O.W.N. 172, 175-6 (Ont. Ct. App.). See also Rex v. Williams, [1942] A.C. 541, 559-60 (P.C.); Treasurer of Ontario v. Blonde, [1946] 4 D.L.R. 785, 789-90 (P.C.); Attorney-General v. Dame Mallord, [1946] C.S. 379, 387-8 (Que. Super. Ct. 1945) (appeal settlement out of court, Dec. 12, 1945).

125. [1942] A.C. 541 (P.C.). The other leading decision on the provincial tax situs of shares transferable in more than one jurisdiction is Treasurer of Ontario v. Blonde, Treasurer of Ontario v. Aberdein, [1946] 4 D.L.R. 785 (P.C.) See Fairbanks, *Shares of a Non-Resident Decedent—A Canadian View*, 22 TAXES 103 (1944).

On this showing the Privy Council concluded that the shares were not "situate within Ontario" and that they were not subject to Ontario succession duty.

Subsequent decisions have established that the same rule applies to shares which at their owner's death are neither endorsed in blank [126] nor physically located [127] in a jurisdiction in which a share transfer office is maintained—for example, where shares physically located in Detroit at the time of their owner's death are registered in his name and are transferable only in Toronto or in Buffalo.[128] The same result would follow were the shares transferable both in Ontario and in one of the provinces which levy no succession duty.[129] Of course, a provincial succession tax will be payable if the shares are actually sent for transfer to a registry office within Ontario or Quebec,[130] or perhaps even if they are physically located within either province and legally transferable therein.[131]

Moral for Estate Planners

An intelligent *inter vivos* application of the foregoing rules will enable a non-resident of Ontario and Quebec to arrange his investments so to avoid pay-

126. The King v. Globe Indemnity Co., [1944] O.W.N. 348, 349 (Ont. High Ct. of Just.), *appeal dismissed,* [1945] O.W.N. 172 (Ont. Ct. App.); Maxwell v. The King, [1945] O.W.N. 177 (Ont. Ct. App.); *Re* Russell, [1942] O.W.N. 412 (Ont. Sup. Ct.); *Re* Thoburn: Ivey v. The King, [1939] 1 D.L.R. 631 (Que. K.B., Appeals Side, 1938); Attorney-General v. Dame Mallord, [1946] C.S. 379 (Que. Super. Ct. 1945) (appeal settlement out of court, Dec. 12, 1945); Treasurer of Ontario v. Blonde, [1946] 4 D.L.R. 785, 789-90 (P.C.).

127. Treasurer of Ontario v. Aberdein, [1946] 4 D.L.R. 785, 789-90 (P.C.); The King v. Globe Indemnity Co., [1945] O.W.N. 172 (Ont. Ct. App.); Maxwell v. The King, [1945] O.W.N. 177 (Ont. Ct. App.).

128. The King v. Globe Indemnity Co., [1945] O.W.N. 172 (Ont. Ct. App.).

129. "Their Lordships are now in a position to deal with the problem arising from the existence of two valid registries, one in Ontario and one in Buffalo. They observe that the solution must be the same in this case as it would have been if the testator had been domiciled in another province of Canada, say in Quebec, instead of in New York, and if all the other facts had been as they were in fact, including the existence of a separate registry in Quebec." Rex v. Williams, [1942] A.C. 541, 559 (P.C.).

130. "The shares were not brought within Ontario by any act of the executor; he had not taken advantage of s. 62 of The Companies Act to transfer them to his own name, but had acted under a will admitted to probate in the State of Michigan, and by virtue of such recognition as was given to it in the State of New York, had effected a complete transfer of the shares. Had he elected to come within Ontario by applying for letters probate here, or even by taking advantage of s. 62 of The Companies Act, he might be held to have brought himself within the provisions of The Succession Duty Act." The King v. Globe Indemnity Co., [1945] O.W.N. 172, 176 (Ont. Ct. App.). See also Christie v. British-American Oil Co., [1947] 3 D.L.R. 498 (Ont. High Ct. of Just.).

131. On this point it has been held that "these shares are situate in the Province where their certificates are found, if they may be disposed of in the Province, that is to say transferred, assigned or sold, by endorsement and delivery of the certificates without having to make any further deed of disposition." *Re* Thoburn: Ivey v. The King, [1939] 1 D.L.R. 631, 632 (Que. K.B., Appeal Side, 1938).

ment of succession duties levied by those two provinces without seriously curtailing his freedom of investment choice. The first rule to be observed is that bonds of the Dominion, provinces, and municipalities of Canada, as well as all bonds issued under seal or representing indebtedness created by statute, should never be physically located in either Ontario or Quebec.[132] Negotiable instruments of all kinds,[133] as well as common law specialties,[134] should never be physically located in either Ontario or Quebec, since both kinds of documents acquire a provincial tax situs where physically located. Real estate mortgage bonds should not be purchased if some act in connection therewith must be performed either in Ontario and/or Quebec.[135] If an account is maintained in a Canadian bank, a branch located elsewhere than in Ontario or Quebec should be selected.[136] Insurance payable in either province should likewise be avoided.[137]

Finally, an investor should not purchase stocks transferable only in the two provinces levying succession duties.[138] If stock transferable in either province is purchased, care should be taken that such shares are also transferable in some other jurisdiction, either the United States [139] or one of the Canadian provinces other than Quebec or Ontario.[140] Shares legally transferable only

132. See Royal Trust Company v. Attorney-General for Alberta, [1930] A.C. 144 (P.C. 1929); General Trusts Corp. v. The King, [1919] A.C. 679 (P.C.); *Re* Moore, [1937] O.W.N. 304 (Ont. High Ct. of Just.); *Re* Mathews, [1938] 2 D.L.R. 763 (York County Surrog. Ct., Ont., 1937); The King v. Sanner and Bank of Montreal, 74 C.S. 42 (Que. Super. Ct. 1936).

133. See Provincial Treasurer of Manitoba v. Bennett, [1937] 2 D.L.R. 1 (Can. Sup. Ct.); The King v. Sanner and Bank of Montreal, 74 S.C. 42 (Que. Super. Ct. 1936); *Re* Mathews, [1938] 2 D.L.R. 763, 764 (York County Surrog. Ct., Ont., 1937).

134. See The King v. National Trust Co., [1933] S.C.R. (Can.) 670; Treasurer v. Pattin, 22 Ont. L.R. 184 (Ont. Ct. App. 1910).

135. See Toronto General Trusts Corp. v. The King, [1919] A.C. 679 (P.C.). *But cf. In re* Treasury Department Act, 1938, *In re* Dalrymple Estate, Hogg v. Provincial Tax Commission, [1941] 2 W.W.R. 253 (K.B. Sask.).

136. See Rex v. Lovitt, [1912] A.C. 212 (P.C. 1911); The King v. Sanner and Bank of Montreal, 74 S.C. 42 (Que. Super. Ct. 1936); The King v. National Trust Co., [1933] S.C.R. (Can.) 670.

137. *Cf. In re* The Succession Duty Act, *In re* Lawton Estate, [1944] 2 W.W.R. 265 (K.B. Manitoba).

138. Where a decedent resident of Massachusetts owned stock in a corporation "which had no transfer agent outside Ontario . . . it was admitted that these shares were subject to duty in Ontario." *Re* Aberdein Estate, [1945] O.W.N. 179 (Ont. Ct. App.); *accord,* Erie Beach Co. v. Attorney-General for Ontario, [1930] A.C. 161 (P.C. 1929). Transferability is essentially a matter of corporate law, and of the provisions in the company charter and by-laws; it is not a matter of tax law. *Cf. Re* Hatch and Fanny Farmer Candy Shops, Inc., [1944] O.W.N. 716 (Ont. Ct. App.), *allowing appeal* from *Re* Hatch, [1944] O.W.N. 445 (Ont. High Ct. of Just.). See also Rex v. Williams, [1942] A.C. 541, 550-4 (P.C.).

139. See Rex v. Williams, [1942] A.C. 541 (P.C.).

140. See Smith v. Provincial Treasurer of Nova Scotia and Province of Quebec, 58 S.C.R. (Can.) 570 (1919); Brassard v. Smith, [1925] A.C. 371 (P.C. 1924).

at registry offices maintained in jurisdictions other than in either of those two provinces may of course be acquired without adverse tax consequences.[141] Shares legally transferable in either Quebec or Ontario, even where also transferable elsewhere, should never be physically located in either of such provinces,[142] nor sent into either province for transfer.[143] This limitation upon stock investment to corporations maintaining transfer offices other than solely in Ontario and/or Quebec does not in fact impose any substantial investment hardship, since the major companies [144] which present the soundest investment opportunities maintain multiple stock transfer offices.

CONCLUSION

The current investment enthusiasm for Canadian securities serves at once to complicate the task of the estate planner and to increase the scope of his usefulness. Three different sets of situs rules—those laid down in the Convention, those under the Code, and those applicable to Ontario and Quebec—must be mastered and applied when making *inter vivos* investments and when drafting wills. The lack of authoritative information on many situs problems under the Code means that estate planners had best rely on the Convention credit and avoid investment situations entailing provincial tax liability.

A properly drafted will can ensure that the estate of such an investor will bear the minimum combined Dominion and Federal succession and estate

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141. *Re* Mathews, [1938] 2 D.L.R. 763 (York County Surrog. Ct., Ont., 1937); The King v. Cutting, [1932] S.C.R. 410 (Can. Sup. Ct.). See also Erie Beach Co. v. Attorney-General for Ontario, [1930] A.C. 161 (P.C. 1929). And see Guterman, *Avoidance of Double Death Taxation of Estates and Trusts* in PROCEEDINGS OF N.Y.U. 6TH ANN. INSTITUTE ON FEDERAL TAXATION 102, 118-119 (1947).

142. A New York decedent's estate was held subject to Quebec succession duty on 1,500 shares of International Nickel Company stock physically maintained in a custody account with the Royal Bank of Canada in Montreal even though such shares were fully transferable at registry offices maintained by the Company in Toronto, New York, and London, as well as in Montreal, Quebec. Rice v. The King, [1939] 4 D.L.R. 701 (Que. Super. Ct.).

143. See *Re* Thoburn: Ivey v. The King, [1939] 1 D.L.R. 631 (Que. K.B., Appeals Side, 1938); Christie v. British-American Oil Co., [1947] 3 D.L.R. 498 (Ont. High Ct. of Just.).

144. Ten leading companies selected at random maintain share registry offices as follows: Aluminum, Ltd. (Pittsburgh, New York, Toronto [Ontario], and Montreal [Quebec]); Canadian Atlantic Oil Co., Ltd. (New York, Los Angeles, Calgary [Alberta], Vancouver [B.C.], Montreal, and Toronto); Canadian Investment Fund, Ltd. (Jersey City, Vancouver, Charlottetown [Prince Edward Island], Montreal, and Toronto); Canadian Pacific Ry. Co. (New York, Montreal, and Toronto); Consolidated Mining & Smelting Co. of Canada, Ltd., (New York, Montreal, Toronto, and Vancouver); Dome Mines, Ltd., (New York and Toronto); Ford Motor Co. of Canada, Ltd. (New York, Detroit, Montreal, and Toronto); Imperial Oil, Ltd. (New York, Montreal, and Toronto); International Nickel Co. of Canada (New York, Montreal, and Toronto); Noranda Mines, Ltd. (New York, Montreal, and Toronto).

taxes by ensuring that the maximum allowable credit on account of Canadian taxes paid will be available against Federal estate taxes. This may be done in large measure by making specific provision in the will barring use of Canadian securities to fund any marital deduction trust or outright bequests to a surviving spouse, and prohibiting the use of Canadian securities or other assets to discharge charitable legacies.[145] Proper will drafting techniques can save as much as 14.8 percent of the total combined death taxes otherwise payable on a net Federal estate of U.S. $500,000,[146] 7.8 percent in the case of a U.S. $1,000,000 estate,[147] and 11.08 percent in the case of a U.S. $2,000,000 estate,[148] without the slightest alteration in the substantive dispositive provisions of such will. Where tax savings of this magnitude are available through draftsmanship alone, it would appear incumbent upon every estate planner as a matter of basic professional competence to familiarize himself both with the necessary rules and with their proper application.

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145. Appropriate wording to be incorporated in a will might be: "I direct that no asset properly includible both in my gross estate for Federal estate tax purposes and also situate in Canada for the purposes of Canadian Dominion and/or Provincial succession duties shall be allocated to any interests under this my Last Will and Testament passing either to my surviving spouse for which a marital deduction is allowable or to any charitable legatee named herein for which a charitable deduction is allowable, except to the extent that there may not be sufficient other assets of my estate to provide therefor."

146. In arriving at this percentage figure a gross estate, computed for Federal estate tax purposes, of U.S. $500,000 has been assumed, of which U.S. $200,000 is deemed situate in Canada, where U.S. $100,000 is bequeathed to charity and the residue to the decedent's father. Although a bequest to a surviving spouse for which an appropriate marital deduction is available operates on much the same principle as a gift to charity, the succession taxes payable in Canada would be somewhat less.

147. In arriving at this percentage figure a gross estate computed for Federal estate tax purposes of U.S. $1,000,000 has been assumed, of which U.S. $300,000 is deemed situate in Canada, where U.S. $500,000 is bequeathed to decedent's surviving spouse for which an appropriate marital deduction is available.

148. In arriving at this percentage figure a gross estate computed for Federal estate tax purposes of U.S. $2,000,000 has been assumed, of which U.S. $600,000 is deemed situate in Canada, where U.S. $1,000,000 is bequeathed to decedent's surviving spouse for which an appropriate marital deduction is available.